

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

Vicki Coffin,  
Plaintiff,

vs.

Safeway, Inc.; Ray Lopez and DOES  
1 through 50, inclusive,  
Defendants.

No. 03-470-PHX-ROS

**ORDER**

Plaintiff has alleged claims of sexual harassment discrimination pursuant to Title VII, 42 U.S.C. § 2000e-2 *et. seq.* against her employer Safeway, Inc., her supervisor Ray Lopez, and other unnamed defendants. She also has alleged state law claims of intentional infliction of emotional distress ("IIED") against all defendants, and negligence against Safeway. On March 31, 2004, the Court entered an Order (Doc. #18) ruling on Lopez's pending Motion to Dismiss all claims against him. In that Order, the Court promised that a written opinion would follow. This is that opinion. For the reasons stated below, the Court dismissed Plaintiff's sexual harassment claim against Lopez, but allowed Plaintiff's IIED claim against Lopez to proceed.

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1 **I. FACTUAL BACKGROUND**

2 Plaintiff filed her Complaint on March 10, 2003, requesting relief for damages,  
3 attorney's fees and costs, exemplary and punitive damages, prejudgment interest, and other  
4 relief. [Doc. # 1 ¶¶ 1-7].

5 In support of Plaintiff's sexual harassment claim she alleges that Safeway and Lopez  
6 discriminated against her by subjecting her to sexual harassment in violation of Title VII.  
7 Plaintiff asserts that Lopez "used his position as a managerial supervisor at Safeway" to  
8 sexually harass and discriminate against her. [Id. ¶ 12.]. For example, Plaintiff alleges that  
9 Lopez "sought sexual favors . . . [and] made numerous verbal remarks, sounds, gestures to  
10 Plaintiff such as (1) 'you smell so good I could almost taste you' (2) 'I bet you taste good'  
11 (3) 'I wish you would gain more weight because I like more meat on your butt.'" [Id.]. Also,  
12 Plaintiff alleges that Lopez "would frequently walk up behind her and while in close  
13 proximity would tell [her] that he wanted to rub up against her body." [Id.]. Plaintiff further  
14 alleges that because Safeway did not take any corrective measures to stop Lopez after female  
15 employees notified Safeway of the sexual harassment, Safeway is "culpable and guilty" of  
16 sexual harassment. [Id. ¶ 14.].

17 Additionally, Plaintiff contends that Safeway discriminated against her and subjected  
18 her to sexual harassment by creating a hostile work environment in violation of Title VII.  
19 Specifically, Plaintiff alleges that Safeway condoned the improper behavior and failed to  
20 discipline its employees, including Lopez, who engaged in activity that sexually harassed and  
21 discriminated against Plaintiff and other similarly-situated female Safeway employees. [Id.  
22 ¶¶ 23-24.]. Plaintiff further alleges that the "harassment, discrimination, and creation of a  
23 hostile work environment by Defendants was intentional and malicious." [Id. ¶ 33-34.].  
24 Plaintiff contends that because of Safeway's and Lopez's "intentional and malicious  
25 conduct" she has "suffered humiliation, mental anguish and emotional and physical distress  
26 of mind and body in the form of fear, shock, anger, worry, humiliation, nervousness,  
27 irritability, insomnia, [and] loss of appetite." [Id. ¶ 34.].

1 Finally, Plaintiff alleges that Safeway was negligent for not taking appropriate  
2 measures to discipline Lopez and other Safeway employees after female employees had  
3 complained of sexual harassment discrimination. Plaintiff asserts that "Safeway breached  
4 its duty of care to the Plaintiff by failing to discipline or terminate Defendant Lopez, and  
5 failing to take any corrective measures [and] safeguards in order to protect female employees,  
6 including Plaintiff." [Id. ¶ 40.]. Plaintiff argues that her injuries are "a proximate result" of  
7 Safeway's actions. [Id. ¶ 42.].

8 In response to Plaintiff's sexual harassment claim, Lopez asserts that he should be  
9 dismissed from the suit because he is not an "employer" within the meaning of Title VII.  
10 [Doc. #5]. Lopez argues that when Congress enacted Title VII, Congress limited liability to  
11 employers with 15 or more employees and precluded claims against individual employees.  
12 Moreover, Lopez contends that because he did not "employ[] [Plaintiff] in any capacity," he  
13 cannot be held liable under Title VII. [Id.]. Moreover, Lopez argues that since Plaintiff's  
14 Opposition to Defendant's Motion to Dismiss did not respond to Lopez's motion to dismiss  
15 the sexual harassment claim, Lopez's Motion should be granted and that claim against him  
16 should be dismissed under Local Rule 1.10(i).

17 In response to Plaintiff's claim of IIED, Lopez argues that Plaintiff's factual basis for  
18 the claim does not demonstrate conduct that was sufficiently "extreme and outrageous" to  
19 support a claim of IIED under Arizona law. [Doc. #5].

## 20 **II. PROCEDURAL HISTORY**

21 As noted, Plaintiff filed her Complaint on March 10, 2003. [Doc. #1]. On April 25,  
22 2003, Safeway answered the Complaint (Doc. #4) and on April 25, 2003 Lopez filed a  
23 Motion to Dismiss, requesting the Court to dismiss him from the suit. [Doc. # 5]. Plaintiff  
24 filed an Opposition on May 8, 2003 (Doc. # 7), and Defendant filed a Reply on May 19,  
25 2003. [Doc. # 10].  
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1 **III. DISCUSSION**

2 **A. Jurisdiction**

3 Plaintiff's federal law claims fall within the scope of Title VII of the Civil Rights Act  
4 of 1964, as amended ("Title VII"). 42 U.S.C. § 2000e *et. seq.* The Court therefore has  
5 jurisdiction over Plaintiff's federal law claims under 28 U.S.C. § 1331 (federal question  
6 jurisdiction) and pendent jurisdiction over Plaintiff's state law claims under 28 U.S.C. §  
7 1343.

8 **B. Legal Standards**

9 **1. Rule 12(b)(6) Motion to Dismiss**

10 A court may not dismiss a complaint for failure to state a claim "unless it appears  
11 beyond doubt that the plaintiff can prove no set of facts in support of his claims which would  
12 entitle him to relief." Barnett v. Centoni, 31 F.3d 813, 813 (9th Cir. 1994) (citing Buckley v.  
13 Los Angeles, 957 F.2d 652, 654 (9th Cir. 1992)); see Conley v. Gibson, 355 U.S. 41, 47  
14 (1957); Parks Sch. of Bus., Inc. v. Symington, 51 F.3d 1480, 1484 (9th Cir. 1995). "All that  
15 is required are sufficient allegations to put defendants fairly on notice of the claims against  
16 them." McKeever v. Block, 932 F.2d 795, 798 (9th Cir. 1991) (citing Conley, 355 U.S. at  
17 47; 5 C. Wright & A. Miller, Federal Practice & Procedure § 1202 (2d ed. 1990)).

18 When analyzing a complaint for failure to state a claim, "[a]ll allegations of material  
19 fact are taken as true and construed in the light most favorable to the non-moving party."  
20 Smith v. Jackson, 84 F.3d 1213, 1217 (9th Cir. 1996); see Miree v. DeKalb County, 433 U.S.  
21 25, 27 n.2 (1977). In addition, the district court must assume that all general allegations  
22 "embrace whatever specific facts might be necessary to support them." Peloza v. Capistrano  
23 Unified Sch. Dist., 37 F.3d 517, 521 (9th Cir. 1994), cert. denied, 515 U.S. 1173 (1995)  
24 (citations omitted). The district court need not assume, however, that the plaintiff can prove  
25 facts different from those alleged in the complaint. See Associated Gen. Contractors of  
26 Cal. v. California State Council of Carpenters, 459 U.S. 519, 526 (1983).

1 "Dismissal can be based on the lack of a cognizable legal theory or the absence of  
2 sufficient facts alleged under a cognizable legal theory." Balistreri v. Pacifica Police Dept.,  
3 901 F.2d 696, 699 (9th Cir. 1988); see William W. Schwarzer et al., Federal Civil Procedure  
4 Before Trial § 9:187, at 9-46 (2002). Alternatively, dismissal may be appropriate when the  
5 plaintiff has included sufficient allegations disclosing some absolute defense or bar to  
6 recovery. See Weisbuch v. County of L.A., 119 F.3d 778, 783, n.1 (9th Cir. 1997) ("If the  
7 pleadings establish facts compelling a decision one way, that is as good as if depositions and  
8 other . . . evidence on summary judgment establishes the identical facts."); see also Federal  
9 Civil Procedure Before Trial § 9:193, at 9-47.

10 2. Rule 8(a)

11 Rule 8(a)(2) of the Federal Rules of Civil Procedure sets forth the procedural  
12 requirements for pleading a claim in federal court. Under Rule 8(a), a complaint must  
13 contain "a short and plain statement of the claim showing that the pleader is entitled to  
14 relief." Rule 8 "mean[s] what it sa[ys]." Leatherman v. Tarrant County Narcotics Intelligence  
15 & Coordination Unit, 507 U.S. 163, 168 (1993). "The Rule 8 standard contains a powerful  
16 presumption against rejecting pleadings for failure to state a claim." Gilligan v. Jamco Dev.  
17 Corp., 108 F.3d 246, 249 (9th Cir. 1997). A claimant need not "set out in detail the facts upon  
18 which he bases his claim." Conley v. Gibson, 355 U.S. 41, 47 (1957). Rather, the complaint  
19 need only provide the defendant "fair notice of what the plaintiff's claim is and the grounds  
20 upon which it rests." Id. Accordingly, in evaluating the sufficiency of a complaint, the  
21 court's role "is necessarily a limited one," confined to evaluating "not whether a plaintiff will  
22 ultimately prevail," but "whether the claimant is entitled to offer evidence to support the  
23 claims." Scheuer v. Rhodes, 416 U.S. 232, 236 (1974), abrogated on other grounds, Harlow  
24 v. Fitzgerald, 457 U.S. 800 (1982)). Indeed, although "it may appear on the face of the  
25 pleadings that a recovery is very remote and unlikely[,] . . . that is not the test." Gilligan,  
26 108 F.3d at 249 (quoting Scheuer, 416 U.S. at 236).

1 "A plaintiff need not make a prima facie case showing to survive a motion to dismiss  
2 provided he otherwise sets forth a short and plain statement of his claim showing that he is  
3 entitled to relief." Ortez v. Washington County, 88 F.3d 804, 807 (9th Cir. 1996). For  
4 example, in Swierkiewicz v. Sorema, N.A., 534 U.S. 506 (2002), the Supreme Court  
5 reaffirmed the liberal pleading requirement under Rule 8. In Swierkiewicz, the Court  
6 addressed whether an employment discrimination complaint must contain specific facts  
7 establishing a prima facie case of discrimination under McDonnell Douglas Corp. v. Green,  
8 411 U.S. 792 (1973). The Court held that a complaint need not establish a prima facie case  
9 under McDonnell Douglas, but instead must comport with the "short and plain statement of  
10 the claim" requirement of Rule 8. In so holding, the Court stressed its own precedent and  
11 support for Rule 8's "simplified notice pleading" standard. Id. at 511-14. "This simplified  
12 notice pleading standard," the Court said, "relies on liberal discovery rules and summary  
13 judgment motions to define disputed facts and issues and to dispose of unmeritorious  
14 claims." Id. (relying on Conley and Leatherman). "Thus, complaints . . . must satisfy only  
15 the simple requirements of Rule 8(a). Id. at 513.

16 **C. Defendant Lopez's Motion to Dismiss**

17 Lopez asserts that the Court should dismiss Plaintiff's sexual harassment claim against  
18 him because he is not an "employer" under Title VII. Lopez further asserts that the Court  
19 should dismiss Plaintiff's sexual harassment claim pursuant to Local Rule 1.10(i) because  
20 in Plaintiff's Response to Lopez's Motion to Dismiss, she failed to respond to Lopez's  
21 argument that her Title VII claim against him should be dismissed. Lopez further asserts that  
22 the Court should dismiss Plaintiff's claim for IIED because his conduct did not constitute  
23 "extreme and outrageous conduct" under Arizona law.

24 **1. Plaintiff's sexual harassment claim against Lopez**

25 "Title VII prohibits employment discrimination on account of race, sex, religion, and  
26 national origin." Gay v. Waiters' & Dairy Lunchmen's Union, Local No. 30, 694 F.2d 531,  
27 536 (9th Cir. 1982) (citing 42 U.S.C. § 2000e-2(a)). Specifically, Title VII provides, in  
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1 pertinent part: "It shall be an unlawful employment practice for an employer to . . .  
2 discriminate against any individual with respect to his compensation, terms, conditions, or  
3 privileges of employment, because of such individual's race, color, religion, sex, or national  
4 origin." 42 U.S.C. § 2000e-2(a)(1).

5 Title VII only applies to employers, not employees. Miller v. Maxwell's Int'l, Inc.,  
6 991 F.2d 583, 587 (9th Cir. 1993). "The statutory scheme itself indicates that Congress did  
7 not intend to impose individual liability on employees." Id. "Title VII limits liability to  
8 employers with fifteen or more employees . . . because Congress did not want to burden small  
9 entities with the costs associated with litigating discrimination claims." Id. "If Congress  
10 decided to protect small entities with limited resources from liability, it is inconceivable that  
11 Congress intended to allow civil liability to run against individual employees." Id. The  
12 Miller court further outlined a policy reason supporting Title VII's exclusion of individual  
13 employees from liability. The court explained that "[n]o employer will allow supervisory or  
14 other personnel to violate Title VII when the employer is liable for the Title VII violation."  
15 Miller, 991 at 558. The court went to state "[a]n employer that has incurred civil damages  
16 because one of its employees believes he can violate Title VII with impunity will quickly  
17 correct that employee's erroneous belief." Id.

18 Additionally, an employee that is a supervisor cannot be held liable under Title VII.  
19 Pink v. Modoc Indian Health Project, Inc., 157 F.3d 1185, 1189 (9th Cir. 1998) ("[C]ivil  
20 liability for employment discrimination does not extend to individual agents of the employer  
21 who committed the violations, even if that agent is a supervisory employee); see also  
22 Greenlaw v. Garrett, 59 F.3d 994, 1001 (9th Cir. 1995) ("Under Title VII there is no personal  
23 liability for employees, including supervisors").

24 The Court will dismiss Plaintiff's sexual harassment claim against Lopez because  
25 Lopez is not an employer under Title VII. Here, the Plaintiff concedes that Lopez is  
26 Plaintiff's supervisor and Lopez is a Safeway employee. Since Lopez is an employee  
27 supervisor at Safeway he cannot be an employer as defined under Title VII.

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1                   2.     Local Rule 1.10(i)

2           Lopez also argues that the Court may summarily dismiss Plaintiff's claim of sexual  
3 harassment against him pursuant to Rule 1.10(i), Rules of Practice of the United States  
4 District Court for the District of Arizona ("Local Rules"), because her Response contained  
5 no argument or evidence concerning that claim. [Doc. #10]. As noted above, because Title  
6 VII does not impose individual liability on employees, Plaintiff's claim of sexual harassment  
7 pursuant to Title VII against Lopez will be dismissed as a matter of law. Accordingly, the  
8 Court need not address Lopez's argument that the claim should be dismissed pursuant to  
9 Local Rule 1.10(i). The Court notes, however, that the absence of any discussion or  
10 argument by Plaintiff in her Response regarding Lopez's liability for sexual harassment may  
11 be attributable to her counsel's recognition that the law does not support the Title VII  
12 harassment claim against Lopez. In light of the requirement of Rule 11(b)(2), Federal Rules  
13 of Civil Procedure that a pleading must be "warranted by existing law," Lopez's counsel may  
14 purposefully have omitted any argument on that claim after realizing the claim was not  
15 supported by law.

16                   3.     Intentional Infliction of Emotional Distress

17                   a.     *Federal law of notice pleading applies*

18           In diversity actions such as this, federal rules of civil procedure govern. "[I]f there  
19 is a federal rule of procedure covering a particular point of practice or pleading in dispute,  
20 such rule governs in a federal diversity action even if resort to state law would lead to a  
21 different result." Santana v. Holiday Inns, Inc., 686 F.2d 736, 740 (9<sup>th</sup> Cir. 1982) (citing  
22 Hanna v. Plummer, 380 U.S. 460 (1965)). Lopez has asked the Court to dismiss Plaintiff's  
23 IIED claim pursuant to Rule 12(b)(6), Federal Rules of Civil Procedure, claiming that the  
24 allegations of the Complaint fail to meet the "high" standard of conduct required to support  
25 her IIED claim under Arizona law. [Doc. #5, p. 5]. As noted, the sufficiency of Plaintiff's  
26 pleadings is governed by Rule 8, Federal Rules of Civil Procedure, which requires that  
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1 Plaintiff have offered only "a short and plain statement of the claim showing that [she] is  
2 entitled to relief."<sup>1</sup>

3 *b. Elements of the tort of IIED under Arizona law*

4 Arizona courts have set forth the elements for the tort of IIED relying on the language  
5 of the Restatement (Second) of Torts. Ford v. Revlon, Inc., 153 Ariz. 38, 44, 734 P.2d 580,  
6 586 (Ariz. 1987) (citing Savage v. Boies, 77 Ariz. 355, 272 P.2d 349 (1954)). "The elements  
7 of a cause of action for intentional infliction of emotional distress are: [1] the conduct of the  
8 defendant must be extreme and outrageous; [2] the defendant must either intend to cause  
9 emotional distress or recklessly disregard the near certainty that such distress will result from  
10 his conduct; and [3] severe emotional distress must indeed occur as a result of defendant's  
11 conduct." Johnson v. McDonald, 197 Ariz. 155, 160, 3 P.3d 1075, 1080 (Ct. App. 1995)  
12 (citing Ford, 153 Ariz. at 43, 734 P.2d at 585). Arizona follows the definition of the  
13 "extreme and outrageous conduct" element provided in the Restatement (Second) of Torts  
14 § 46 (comment d):

15 Liability has been found only where the conduct has been so outrageous in  
16 character, and so extreme in degree, as to go beyond all possible bounds of  
17 decency, and to be regarded as atrocious, and utterly intolerable in a civilized  
18 community. Generally, the case is one in which the recitation of the facts to  
an average member of the community would arouse his resentment against the  
actor, and lead him to exclaim, "Outrageous!"

19 See Lucchesi v. Stimmell, 149 Ariz. 76, 78, 716 P.2d 1013, 1016 (1986); Cluff v. Farmers  
20 Ins. Exch., 10 Ariz. App. 560, 562, 460 P.2d 666, 668 (1969).

21 Because the terms "outrageous conduct" and "severe emotional distress" evade  
22 precise legal definition, a case-by-case analysis is necessary. Lucchesi v. Stimmell, 149 Ariz.  
23 at 79, 716 P.2d at 1016. One factor used by courts to analyze these terms is the "position  
24 occupied by the defendant." Id. (citing Restatement (Second) of Torts § 46 comment e).  
25 Comment e provides that "the extreme and outrageous character of conduct may arise from  
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27 <sup>1</sup> There is no conflict between Rule 8, Fed. R. Civ. P. and the complementary Arizona  
28 rule of procedure, Rule 8, Ariz. R. Civ. P. In fact, these rules are "identical." Anserv Ins.  
Servs., Inc. v. Albrecht, 192 Ariz. 48, 49, 960 P.2d 1159, 1160 (1998).

1 an abuse by the actor of a position, or a relation with the other, which gives him actual or  
2 apparent authority over the other, or power to affect his interests."

3 c. *Plaintiff's allegations of IIED based on Lopez's conduct*

4 Plaintiff alleges that Lopez's unwanted sexual overtures and actions occurred  
5 "repeatedly" and "continuously" between July 2001 and February 2002. As noted, Plaintiff  
6 alleges that Lopez made verbal remarks to her such as "I bet you taste good," and "I wish you  
7 would gain more weight because I like more meat on your butt," would caress Plaintiff's  
8 hands "in a sexual manner," and would walk up behind her and in close proximity tell  
9 Plaintiff he wanted to rub up against her body. [Compl. ¶ 12]. Additionally, Plaintiff alleges  
10 that female Safeway employees complained to the store manager about Lopez's behavior and  
11 that he did not take any action to protect female employees against Lopez. Plaintiff alleges  
12 she suffered "humiliation, mental anguish and emotional and physical distress of mind and  
13 body in the form of fear, shock, anger, worry, humiliation, nervousness, irritability, insomnia,  
14 [and] loss of appetite." [*Id.* ¶ 34].

15 Lopez argues that Plaintiff's allegations of sexual harassment are "simply insufficient  
16 to rise to the level of 'extreme and outrageous conduct' under Arizona law" (Doc. # 5, p. 7),  
17 and "fall short of the high threshold that Arizona courts have justifiably set for intentional  
18 infliction claims" (Doc. #10, p. 6). To support this argument, Plaintiff cites to a number of  
19 opinions by Arizona state courts or by federal courts interpreting Arizona law, which address  
20 claims of IIED. As the following discussion explains, the cases cited by Lopez do not  
21 resolve Plaintiff's claims because the cases are all distinguishable on the facts and, with a  
22 single exception, the cases were not decided at the pleading stage, but rather on motions for  
23 summary judgment or a procedural equivalent.

24 Moreover, to the extent that Lopez argues that a plaintiff alleging an IIED claim under  
25 Arizona law is held to a higher pleading standard than that required by Rule 8, neither  
26 Plaintiff's pleadings nor case law support such an argument. As the Supreme Court observed  
27 in Swierkiewicz, "Rule 8(a)'s simplified pleading standard applies to all civil actions, with  
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1 limited exceptions."<sup>2</sup> 534 U.S. at 513. For example, the Swierkiewicz Court held that an  
2 employment discrimination plaintiff need not plead a prima facie case of discrimination in  
3 his complaint to survive a motion to dismiss. Id. at 515. That principle is equally applicable  
4 to Plaintiff's IIED claim.

5 Plaintiff's Complaint satisfies the liberal notice pleading requirements of Federal Rule  
6 of Civil Procedure 8(a). For example, Plaintiff's Complaint alleges that the "harassment,  
7 discrimination and creation of a hostile work environment by [Lopez] was intentional and  
8 malicious and done for the purpose of causing Plaintiff to suffer humiliation, mental anguish  
9 and emotional and physical distress." [Id. ¶ 33]. Furthermore, Plaintiff alleges that Lopez's  
10 actions were taken "with a wanton and reckless disregard of the consequences to [her]" and  
11 caused her to suffer in the "form of fear, shock, anger, worry, humiliation, nervousness,  
12 irritability, insomnia, [and] loss of appetite." [Id. ¶ 34]. She also states that Lopez's actions  
13 caused her to take "stress leave" and ultimately quit her job. [Id., ¶ 8]. Plaintiff's allegations  
14 are fortified by particularized descriptions of the alleged conduct.

15 *d. Lopez's argument that Plaintiff has failed to state a claim of*  
16 *IIED.*

17 Lopez relies heavily on Mintz v. Bell Atlantic Systems Leasing International, Inc., 183  
18 Ariz. 550, 554, 905 P.2d 559, 563 (Ct. App. 1995), the only case he cited that was decided  
19 on a motion to dismiss. In Mintz, the plaintiff's claims included IIED, gender discrimination  
20 and retaliation. The plaintiff was hospitalized with severe emotional and psychological  
21 problems after failing to receive a promotion she expected, and her employer ordered her  
22 back to work prior to her doctor's recommended return date. 183 Ariz. at 552, 905 P.2d at  
23 561. The plaintiff lasted only one day at work before landing back in the hospital suffering  
24 from stress. Id. The day after the plaintiff was admitted, her employer delivered a letter to  
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27 <sup>2</sup> Such exceptions involve, for example, averments of fraud or mistake, as is set forth  
28 in Rule 9(b), Fed. R. Civ. P.

1 her in the hospital advising her that her duties had been reassigned. Id. The trial court  
2 granted the defendant employer's motion to dismiss the plaintiff's IIED claim.

3 The court of appeals quoted the plaintiff's allegation of IIED from her complaint, in  
4 which the plaintiff complained that her employer "forc[ed] her to return to work, and hand  
5 deliver[ed] a letter to her while in the hospital," actions the plaintiff argued were "extreme  
6 and outrageous and calculated to cause [her] severe emotional distress . . . ." Id. at 554, 905  
7 P.2d at 563. Upholding the trial court's granting of the employer's motion to dismiss, a  
8 majority opinion of the court of appeals held that the facts alleged did not rise to the extreme  
9 level of outrageousness necessary to state a claim for IIED, stating "[t]he trial court has to  
10 draw a line, and we find no error in where the line was drawn on the facts alleged here." Id.  
11 at 555, 905 P.2d at 564. The court of appeals found relevant the employer's awareness of the  
12 plaintiff's susceptibility to emotional problems, but also the employer's legitimate business  
13 purpose in "seeing that [the plaintiff's] work was done, either by her or by someone else."  
14 Id. at 554, 905 P.2d at 563.

15 The Mintz court cited the Third Circuit Court of Appeals case of Cox v. Keystone  
16 Carbon Co., 861 F.2d 390, 395 (3d Cir. 1988) to "illustrate just how outrageous alleged  
17 conduct must be to state a claim for [IIED] in the employment context." Id. at 555, 905 P.2d  
18 at 564. Cox, however, was decided at the summary judgment stage (motion for directed  
19 verdict) relying on substantive Pennsylvania law holding that it was "extremely rare" to find  
20 sufficiently outrageous conduct in the employment context (citing to Pennsylvania cases  
21 involving employee dismissals). It is clear the court decided the summary judgment on  
22 federal procedural law applied to Pennsylvania state law concerning a claim of IIED.

23 The majority Mintz opinion included a partial dissent authored by Judge Lankford.  
24 Judge Lankford dissented from the court's decision on the plaintiff's IIED claim, and  
25 emphasized that the appeal was from a dismissal, which he first noted is not favored under  
26 Arizona law. 183 Ariz. at 556, 905 P.2d at 565. Assuming the plaintiff's allegations as true,  
27 Judge Lankford concluded that the defendant's conduct was sufficiently outrageous to  
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1 maintain a claim for IIED. He noted particularly that the defendant knew of the plaintiff's  
2 vulnerability, that the letter delivered to the plaintiff in the hospital was sent for no apparent  
3 reason, and that because the plaintiff was an employee of the defendant, this relationship  
4 made the defendant's conduct more outrageous. Id. at 557-58, 905 P.2d at 566-67 (citing the  
5 Restatement (2d) of Torts § 46, cmt. e).

6 The Court encounters little difficulty distinguishing Mintz on its facts. In Mintz, the  
7 defendants' alleged actions included an instance in which her employer required her to return  
8 to work before she was emotionally and psychologically ready and then delivered a letter to  
9 her in the hospital advising her that her job duties were being reassigned, knowing that she  
10 was suffering from emotional distress. Here, Plaintiff alleges she was continuously  
11 subjected to unwanted sexual harassment over an eight-month period. Plaintiff alleged that  
12 over this prolonged period, Lopez subjected her to repeated verbal and physical harassment  
13 that was aggressive and extremely offensive. Plaintiff contends that she suffered physical  
14 and emotional distress to a degree that she ultimately was compelled to go on stress leave and  
15 subsequently to quit her job. [Doc. #1 ¶ 25].

16 Lopez relies on two other Arizona state court opinions in which a plaintiff's claim of  
17 IIED was at issue, Nelson v. Phoenix Resort Corp., 181 Ariz. 188, 888 P.2d 1375 (Ct. App.  
18 1994) and Cummins v. Mold-In Graphics Systems, 200 Ariz. 335, 26 P.2d 518 (Ct. App.  
19 2001), depublished, 201 Ariz. 474, 38 P.3d 12 (2002), to demonstrate the difficulty in  
20 establishing an IIED claim in the employment context. Each case, however, was decided at  
21 the summary judgment stage, where discovery was complete and the courts' obligation was  
22 to determine if there were genuine issues of material fact.

23 Similarly, Lopez cites in support of his argument three District of Arizona cases in  
24 which the court rejected IIED claims involving allegations of extreme and outrageous  
25 discriminatory conduct at the summary judgment stage: Spratt v. Northern Automotive  
26 Corp., 958 F. Supp. 456, 461 (D. Ariz. 1996), Tempesta v. Motorola, Inc., 92 F. Supp. 2d  
27 973, 986-87 (D. Ariz. 1999), and Stingley v. Arizona, 796 F. Supp. 424, 430-31 (D. Ariz.  
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1 1992). Because each case was decided on summary judgment, this trilogy has little  
2 application here.

3 e. Ford v. Revlon, Inc., 153 Ariz. 38, 734 P.2d 580 (Ariz. 1987)

4 Unlike the facts of case law relied on by Lopez, Plaintiff's allegations concern ongoing  
5 incidents of sexual harassment. In Ford v. Revlon, 153 Ariz. 38, 734 P.2d 580 (Ariz. 1987),  
6 which Lopez did not discuss, the Arizona Supreme Court addressed facts that are much more  
7 analogous to Plaintiff's claims than those in Mintz. Whether the facts here meet the mark of  
8 establishing the IIED claim can only be resolved after completion of the depth and breadth  
9 of discovery necessary to finally analyze the claim.

10 In Ford v. Revlon, the plaintiff alleged that her supervisor made improper sexual  
11 advances at a business dinner, the next month told her in front of her friends at a Revlon  
12 company picnic that he wanted to "fuck" her and would "fuck" her if it took him ten years,  
13 and later that day physically accosted her in an aggressively sexual manner, repeating that  
14 he wanted to, and would, "fuck" her. 153 Ariz. at 39-40, 734 P.2d at 581-82. Of great  
15 significance, the plaintiff's claims were not decided by dispositive motion, but before a jury  
16 after the trial court found genuine issues of material fact. The jury found the plaintiff's  
17 supervisor liable for assault and battery, but not liable for IIED, and found Revlon liable for  
18 IIED, but not liable for the assault and battery. Id. at 42, 734 P.2d at 584. The issue before  
19 the Arizona Supreme Court did not involve the plaintiff's claims of IIED against her  
20 supervisor, but rather was whether the employer, Revlon, could be liable for IIED for the way  
21 it handled the plaintiff's complaints of her supervisor's sexual harassment. The Court held  
22 that "Revlon's reckless disregard of [the supervisor's] conduct made it nearly certain that such  
23 emotional distress would . . . occur. Revlon knew that [the supervisor] had subjected [the  
24 plaintiff] to "physical assaults, vulgar remarks, that [the plaintiff] continued to feel threatened  
25 by [her supervisor], and that [the plaintiff] was emotionally distraught, all of which led to a  
26 manifestation of physical problems." Id. at 43, 734 P.2d 585. The court's holding, while  
27 addressed to Revlon's handling of Plaintiff's complaints about her supervisor's conduct, is at  
28

1 least strongly suggestive that the supervisor's actions could be viewed as supporting a claim  
2 of IIED against the supervisor.

3 *f. No law directly on point*

4 The parties have not cited, and the Court on its own has not located, Arizona or  
5 federal opinions deciding whether a plaintiff's allegations supporting a claim of IIED against  
6 her supervisor arising from the supervisor's sexually harassing conduct may survive a motion  
7 to dismiss. The opinions of the Arizona Court of Appeals in Mintz, Nelson, and Cummins  
8 are not dispositive of Plaintiff's claims. None of these cases involved allegations of IIED  
9 based on allegations of sexual harassment, let alone allegations of repeated instances of  
10 sexual harassment.

11 Again, while the Court offers no comment regarding Plaintiff's chances for success  
12 on her claim either by trial or by dispositive motion, it concludes that the Complaint alleges  
13 facts sufficient to support her claim of IIED. The Court notes in particular that Lopez was  
14 Plaintiff's supervisor and Plaintiff's allegations that the sexual harassment was nearly  
15 continuous for a period of many months. Further, the alleged harassment involved extremely  
16 vulgar comments and repugnant physical acts toward Plaintiff by Lopez that, while arguably  
17 not as extreme as those alleged in Ford v. Revlon, are of the same character provoking one  
18 "to exclaim 'Outrageous.'" Restatement (Second) of Torts § 46 (comment d).

19 The Court finds that Plaintiff's allegations in her Complaint have met the pleading  
20 requirements of Rules 8(a) and 12(b)(6). Lopez's Motion to Dismiss Plaintiff's intentional  
21 infliction of emotional distress claim against him has been denied.

22 Accordingly,

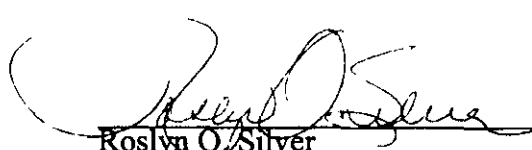
23 **IT IS THEREFORE ORDERED** that Lopez's Motion to Dismiss (Doc. # 5) is  
24 **GRANTED IN PART** as to Plaintiff's sexual harassment discrimination claim against  
25 Lopez.

26 ///

27 ///

1       **IT IS FURTHER ORDERED** that Lopez's Motion to Dismiss (Doc. # 5) is  
2 **DENIED IN PART** as to Plaintiff's claim of intentional infliction of emotional distress  
3 against Defendant Lopez.

4  
5       DATED: 6/26, 2004.

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9       Roslyn O. Silver  
10       United States District Judge  
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